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Of Arms, Funding and "Non-lethal Assistance"—Issues Surrounding Third-State Intervention in the Syrian Civil War

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Abstract

In spite of legal objections, the European Union (EU) in May 2013 gave the conditional green light for the transfer of arms to the Syrian Opposition Council. The EU's decision is not a solitary move. Several other States, including Russia, the United States, Qatar and Saudi Arabia, have provided arms, funding and/or "non-lethal assistance" either to the Syrian government or to rebel forces combatting the Assad regime. The present contribution aims to shed light on the legality of such assistance. On the one hand, it assesses legal objections related to the fact that third-State assistance is used for the commission of widespread war crimes and human rights violations. On the other hand, it examines the compatibility of such assistance with the non-intervention principle and, in so doing, examines to what extent the latter principle discriminates between *de jure* governments and non-State armed groups in the context of a civil war.

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I. Introduction

1. Between its start in early 2011 and late 2013, the Syrian civil war[1] claimed the lives of over 100,000 men, women and children, with thousands of others wounded, more than 2 million having fled the country and over 4 million being internally displaced.[2]

2. Two salient features characterize the Syrian civil war. One is the endemic disregard for the law of armed conflict (LOAC) on the part of government as well as anti-government forces. If the international community initially focused primarily on the gravity and scale of the crimes committed by the Assad regime, it became increasingly evident that anti-government forces are similarly guilty of large-scale violations of LOAC.[3] The August 2013 report of the Independent International Commission of Inquiry on the Syrian Arab Republic ("Commission of Inquiry") leaves little to imagination:

> Government and pro-government forces have continued to conduct widespread attacks on the civilian population, committing murder, torture, rape and enforced disappearance as crimes against humanity. They have laid siege to neighbourhoods and subjected them to indiscriminate shelling. Government forces have committed gross violations of human rights and the war crimes of torture, hostage-taking, murder, execution without due process, rape, attacking protected objects and pillage. Anti-government armed groups have committed war crimes, including murder, execution without due process, torture, hostage-taking and attacking protected objects. They have besieged and indiscriminately shelled civilian neighbourhoods. [4]

3. A second feature is the degree of third-State support on both sides. In the course of 2012–2013, the two main protagonists of the civil war, notably the Assad regime, on the one hand, and the Free Syrian Army (FSA), which to certain extent serves as the

1 The International Committee of the Red Cross (ICRC) in July 2012 expressly concluded that the conflict should be considered as a non-international armed conflict (NIAC). See ICRC, Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting, 17 July 2012 (www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm). The Independent International Commission of Inquiry on the Syrian Arab Republic arrived at the same conclusion in its report of 16 August 2012, UN Doc. A/HRC/21/50, Summary, para.2.

2 See, e.g., UN Under-Secretary-General Valerie Amos, Remarks to the press, Beirut, 6 September 2013.

3 See Melanie De Groof, Arms Transfers to the Syrian Arab Republic, 9 Group for Research and Information on Peace and Security (GRIP) (2013), 18 (www.grip.org/fr/node/1132).

4 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 16 August 2013, UN Doc. A/HCR/24/46, Summary.

military wing of the Syrian Opposition Council (SOC)[5] on the other hand, have indeed been the destinataries of massive transfers of arms, so-called "non-lethal" assistance and funding.[6] The primary patrons of the Assad regime have been Moscow—which has among other things supplied ammunition, anti-aircraft systems and rocket launchers—and Tehran (Iran has reportedly also sent several thousands of Republican Guards to Syria[7]). The FSA in turn has received financial and logistical support, including in the form of arms transfers, primarily, but not exclusively, from Qatar and Saudi Arabia.[8] The Council of the European Union in May 2013 opened the door to the supply of arms to anti-government forces subject to certain preconditions, while simultaneously asserting that "Member States [would] not proceed at this stage with the delivery of the equipment mentioned above".[9] Individual EU Member States, such as the UK, have, however, provided rebel forces with "non-lethal" aid, which apparently includes not only food rations and medicines, but also body armour and armoured vehicles ("to help opposition figures move around more freely").[10] Finally, following the chemical weapons attack near Damascus on 21 August 2013,[11] US Congress also

5 See, e.g.,, National Coalition of Syrian Revolution and Opposition Forces, Syrian Coalition Fact-Sheet (www.etilaf.org/en/about-us/fact-sheet.html), as well as the overview of the Supreme Military Council of the Free Syrian Army (www.etilaf.org/en/coalition-components/supreme-military-council-of-the-free-syrian-army.html), Elizabeth O'Bagy, The Free Syrian Army, Middle East Security Report no. 9 (March 2013), 25 (www.understandingwar.org/sites/default/files/The-Free-Syrian-Army-24MAR.pdf).

6 For an instructive overview of arms transfers to the different parties in the Syrian civil war, see Melanie De Groof, above n.3, 35–41. See also, e.g., Who is Supplying Weapons to the Warring Sides in Syria?, BBC News, 14 June 2013.

7 See, e.g., Robert Fisk, Iran to Send 4,000 Troops to Aid President Assad Forces in Syria, The Independent, 16 June 2103. Hezbollah has also been reported to fight alongside Syrian government forces. See, e.g., Henry Rome, Elite Hezbollah Fighters are Spearheading Battle in Syria, IDF Commander Warns, Jerusalem Post, 25 October 2013. It has even been reported that Saudi Arabia has sent hundreds of death-row inmates to Syria to fight the Assad regime. Michael Winter, Report: Saudis Sent Death-row Inmates to Fight Syria, USA Today, 21 January 2013.

8 See, e.g., Mark Mazzetti, Christopher John Chivers and Eric Schmitt, Taking Outsize role in Syria, Qatar Funnels Arms to Rebels, NY Times, 29 June 2013.

9 Council of the EU, Council Declaration on Syria, 3241st Foreign Affairs Council Meeting, Brussels, 27 May 2013.

10 See, e.g., UK to Send Armoured Vehicles to Syrian Opposition, BBC News, 6 March 2013. The existing EU embargo was eased in February 2013 with a view to enabling such non-lethal assistance. See EU Council Decision 2013/109/CFSP of 28 February 2013 amending Decision 2012/739/CFSP concerning restrictive measures against Syria, OJ 1 March 2013, L-58/8.

11 Syria Chemical Attack: What We Know, BBC News, 24 September 2013.

approved, and the CIA reportedly initiated, the supply of weapons to anti-government forces.[12]

4. Interestingly, when in May 2013, a number of EU Member States (chiefly the UK and France) sought to lift the existing European arms embargo with a view to initiating arms supplies to the FSA, this gave rise to an intense debate—reverberating in the academic blogosphere[13]—with some Members asserting that the transfer of lethal material would be illegal under international law[14] and others eager to find rather "creative" ways to circumvent objections of illegality.[15] Strikingly, the loudest to voice the position that arms transfers to the FSA would be unlawful was the Russian Federation. According to Russian Foreign Minister Sergei Lavrov: "International law does not allow, does not permit supplies of arms to non-governmental actors and in our point of view it is a violation of international law."[16] Russia's express criticism is remarkable insofar as it has never denied having itself shipped weapons to the Assad regime, and has, by contrast, stressed that, as long as no UN embargo is put in place, it can lawfully continue arms transfers in accordance with existing contractual obligations.[17] Its criticism stands in marked contrast to the rather soft-handed approach of western States on its part. On the one hand, various States expressed concern at Russian arms sales to Damascus. Mid-2013, for instance, US Secretary of State John Kerry stressed that the planned transfer of S-300 missiles from Russia to Syria would not be "helpful" and could prolong the ongoing civil war.[18] Kerry expressed the "hope" that Russia would

12 See, e.g., CIA starts arming Syrian rebels overtly, Reuters, 12 September 2013.

13 See in particular Dapo Akande, Would it be lawful for European (or other) States to provide arms to the Syrian opposition?, EJIL:Talk! blog, 17 January 2013 (www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/); André Nollkaemper, A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition, EJIL:Talk! blog, 17 June 2013 (www.ejiltalk.org/a-shared-responsibility-trap-supplying-weapons-to-the-syrian-opposition/).

14 See Melanie De Groof, above n.3, 41; Julian Borger, Austria Says UK Push to Arm Syrian Rebels Would Violate International Law, The Guardian, 14 May 2013.

15 See in particular Letter by the Dutch Foreign Minister to the House of Representatives, Volkenrechtelijke aspecten sanctieregime Syrië, 4 June 2013 (www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/06/04/kamerbrief-over-de-volkenrechtelijke-aspecten-van-het-sanctieregime-tegen-syrie.html).

16 Arming Syrian Rebels a Breach of International Law, Russia Says, France 24, 13 March 2013; Luke Harding, Russia Warns UK Against Arming Syrian Rebels, The Guardian, 13 March 2013.

17 See, e.g., Russia to keep supplying Syria leader Bashar Assad's regime with "defensive" weapons, CBS News, 13 February 2013; Simon Shuster, Top Russian Diplomat Explains Reasons for Syrian Arms Sales, Time Magazine, 17 May 2013; Tom Parfitt, Russia "Does Not Understand" Uproar over Syria Arms Sales, The Telegraph, 17 May 2013.

18 Russia Warned Not to Deliver Missiles to Syria, CBC News, 31 May 2013.

return on its steps. On the other hand, no express suggestions were uttered that the planned arms transfer infringed international law.

5. The foregoing begs the question how the different arms transfers, and the various forms of support to the warring parties more generally, must be assessed under international law. In particular, it begs the question to what extent arms transfers to *de jure* governments and non-State armed groups (NSAGs) are treated differently under international law, and, more specifically, whether the duty of non-intervention discriminates between *de jure* governments and NSAGs, even in the context of a full-scale civil war. Section II provides an overview of the potential legal obstacles to the provision of arms and other support to government or anti-government forces in the Syrian civil war. Section III focuses on legal obstacles that are related to the commission of grave breaches of the law of armed conflict and/or of international human rights law by the parties to the conflict. Section IV subsequently focuses on the prohibition on the use of force and the duty of non-intervention. Section V concludes this article.

II. Overview of legal aspects

6. A useful point of departure to start our assessment concerns a paper circulated by Austria prior to the (conditional) lifting of the EU arms embargo and rebutting the British and French arguments in support of arms transfers to the FSA.[19] In this document, Austria identifies four reasons why the supply of arms to the Syrian opposition would be unlawful. According to Austria, it would:

- amount to a breach of the customary principle of non-intervention and the principle of non-use of force under Article 2(4) UN Charter;
- violate EU Council Common Position 2008/944/CFSP[20] on arms export control by EU Members;
- amount to a violation of Security Council resolutions establishing an arms embargo against individuals and entities associated with Al-Qaida;
- result in State responsibility for aiding and assisting in the commission of internationally wrongful acts by the recipients of the arms supplies.

The aforementioned list is not exhaustive. Other norms, some of which interact or overlap with the foregoing, that come to mind, include:

- the duty to "respect and ensure respect" for LOAC;

19 Julian Borger, Syria: Austrian Position On Arms Embargo, The Guardian, 13 May 2013 (www.theguardian.com/world/julian-borger-global-security-blog/ interactive/ 2013/may/15/austria-eu-syria-arms-embargo-pdf?guni=Article:in%20body%20link).

20 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ 13 December 2008, L-335/99.

- the "Arms Trade Treaty"[21];
- criminal responsibility for "aiding and abetting" international crimes;
- treaty provisions regulating the transfer of particular weapons.[22]

7. Some of the foregoing aspects do not require elaborate analysis for present purposes. Thus, with regard to the suggestion that arms transfers to the FSA would contravene EU Council Common Position 2008/944/CFSP, it is obvious that this instrument does not bind non-EU Member States. Moreover, it constitutes no absolute bar to arms transfers by EU Member States in that the latter can, at least theoretically, set it aside by adopting divergent legislation at the EU level in respect of the situation in Syria. It is interesting to note in this context that the Council declaration on Syria,[23] adopted by the Foreign Affairs Council of the EU on 27 May 2013, refrained from doing so. Rather, if the Council appears to, at least theoretically, open the door to arms exports to anti-government forces in Syria, such transfers are subject to strict conditions. Firstly, the export of military equipment or of equipment which might be used for internal repression "will be for the Syrian National Coalition for Opposition and Revolutionary Forces and intended for the protection of civilians". Secondly, Member States "shall require adequate safeguards against misuse of authorisations granted, in particular relevant information concerning the end-user and final destination of the delivery". Thirdly, the Council Declaration asserts that Member States shall assess the export licence applications on a case-by-case basis, "taking full account of the criteria set out in Council Common Position 2008/944/CFSP ...." In other words, the restrictions of Council Common Position 2008/944/CFSP are left in place. Given the content of these criteria—which require, for instance, that Member States deny export licences if there is a clear risk that equipment might be used in the commission of serious violations of international humanitarian law; if it would provoke or prolong armed conflicts; if it may affect adversely regional stability in any significant way, and; which require that Member States take into account the buyer's attitude vis-à-vis terrorism—it is hard to see how any export licence could

21 Arms Trade Treaty, New York, 2 April 2013, open for signature 3 June 2013 (treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf#page=21). Even if the Treaty has not entered into force as yet, the law of treaties commands signatory States not to defeat its object and purpose. Vienna Convention on the Law of Treaties, 1155 UNTS 331, art. 18.

22 See on this Maya Brehm, The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law, 12 J. Conflict and Security L. (2008), 359, 366–368.

23 Council of the EU, Council Declaration on Syria, above n.9. Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, OJ 1 June 2013, L-147-14, "took note" of the Council Declaration of 27 May 2013.

possibly be granted for the supply of arms to the Syrian opposition without infringing the Common Position.[24] There indeed exists extensive proof that anti-government forces (like government forces) have committed serious violations of LOAC, e.g., by indiscriminately shelling civilian neighbourhoods, by engaging in torture and summary executions, etc.[25] In a similar vein, it is clear that, as in any civil war, the supply of arms to the warring parties risks prolonging the ongoing armed conflict,[26] and that the war has a regional spill-over effect.[27] Finally, it is no secret that a number of groups part of, or affiliated with, the Free Syrian Army consist of radical Islamists and that some work with other armed groups, thought to be linked to Al-Qaeda.[28]

8. The latter aspect brings us to another concern, namely the suggestion that arms transfers to the Syrian rebels would run counter to Security Council sanctions on individuals and entities associated with Al-Qaeda. Resolution 2083 (2012)[29] indeed prescribes that States shall prevent the direct or indirect supply, sale, or transfer to Al-Qaeda-related groups and individuals of arms and related materiel. It is worth noting in this context that a number of Syrian rebel groups, most notably the Al-Nusra Front and the Islamic State of Iraq and the Levant (ISIS), are thought to have links to Al-Qaeda. Various States supplying assistance to anti-government forces have tried to channel that assistance through the Supreme Military Command (SMC) of the Free Syrian Army, specifically with a view to preventing arms and other materiel from falling into the hands of radical, and possibly Al-Qaeda-related, armed groups such as Al-Nusra.[30] This has in turn led several armed groups, including more radicalized ones, to pledge allegiance to the SMC, so as to gain access to such supplies. In all, it is clear that Resolution 2083 (2012) requires States to exercise due care to ensure that arms transferred to anti-government forces do not end up in the hands of Al-Qaeda-affiliated groups.[31] As mentioned above, the EU Council Declaration on Syria provides in this context that Member States must require relevant information concerning "the end-user and final destination of the delivery". Whether this requirement suffices to comply with Resolution 2083 (2012) arguably hinges on the way in which it is eventually implemented and monitored by individual EU Member

24 In a similar vein: Julian Borger, above n.19; Melanie De Groof, above n.3, 43–44.

25 See, e.g., Report of the Commission of Inquiry, Doc. A/HCR/24/46, above n.4.

26 Ibid., Summary and paras.18–23.

27 Ibid., para.23.

28 See, e.g., Syria Crisis: Guide to Armed and Political Opposition, BBC News, 13 December 2013.

29 SC Res. 2083 (2012), 17 December 2012, art. 1(c).

30 See Melanie De Groof, above n.3, 14.

31 In this sense, see Michael N. Schmitt, Legitimacy Versus Legality Redux: Arming the Syrian Rebels, 7 J. Nat'l Security L and Policy (2014), 139–59.

States. At the same time, Resolution 2083 (2012) does not constitute an absolute bar to arms transfers to non-government forces involved in the Syrian civil war.

III. Objections related to the widespread commission of war crimes by both sides in the Syrian civil war

III.A. Individual criminal responsibility for "aiding and abetting"

9. Several of the potential legal objections listed above are based on the assumption that the provision of arms, and possibly also other aid, to government or anti-government forces may give rise to responsibility under international law insofar as these arms/this aid are/is (likely to be) used for the widespread commission of war crimes and human rights violations. Three such objections come to mind.[32]

10. Firstly, the question arises whether arms transfers to forces who are known to commit war crimes and/or crimes against humanity can be qualified as the "aiding and abetting" of such crimes, giving rise to international criminal responsibility of the accessory/ies.[33] In the 1999 *Tadić* judgment, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber explains the material element and the mental element of criminal liability for "aiding and abetting" as follows:

> The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime …, and this support has a substantial effect upon the perpetration of the crime ….
>
> [T]he requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. [34]

32 As far as possible State responsibility under international human rights law is concerned, it can be observed that even if arms transfer decisions may produce effects abroad, the authorization of such transfers is probably not an act with sufficiently proximate repercussions on the rights of victims of armed violence so as to bring them within the jurisdiction of the State organizing the arms transfer. This was the position adopted by the European Commission of Human Rights in Tugar v. Italy (EComHR, First Chamber, Tugar v. Italy, Application no. 22869/93, Decision on Admissibility, 18 October 1995). Brehm concludes that "[h]uman rights law does not provide a sufficient basis to prohibit arms transfers in cases where it is likely or where there is a serious risk that they will be used to commit serious human rights violations abroad … ." Maya Brehm, above n.22, 380–383. In a similar vein: Melanie De Groof, above n.3, 47–48.

33 As is well known, "aiding and abetting" is a mode of liability which does not presuppose that the principal perpetrators and the accessory/ies share a joint criminal intent. Rather, what is required is that the person supporting or assisting in the crime is aware that his action helps the perpetrators in the commission of the crime, and intends to encourage such commission. See e.g. Antonio Cassese, International Criminal Law (2nd edn. 2008), 214–217.

34 ICTY Appeals Chamber, Prosecutor v. Tadić, IT-94-1-A, 15 July 1999, para.229.

11. Applying this twofold test to the case at hand, it is clear that States transferring arms to the Assad regime or to anti-government forces are fully cognizant of the fact that these arms are used by both sides to perform war crimes. Likewise, it is hard to deny the fact that the massive influx of weapons and ammunition has a "substantial effect" on the perpetration of these crimes. At the same time, the *Tadič* test also requires that the assistance be "specifically"—rather than "in some way"—directed towards relevant crimes.[35] The requirement of "specific direction" as a component of aiding and abetting liability was recently reaffirmed and clarified by the ICTY Appeals Chamber in its *Momčilo Perišič* judgment.

12. By analogy to the reasoning in *Momčilo Perišič*,[36] there appears to be no proof in the case under consideration that arms transfers—whether to the Assad regime or to anti-government forces—are "specifically directed" to the commission of international crimes. Indeed, there are no known indications that third-State sponsors have endorsed or encouraged the commission of these crimes. Nor can the NSAGs taking part in the

35 ICTY Appeals Chamber, Prosecutor v. Momčilo Perišić, IT-04-81-A, 28 February 2013, para.27. But see: ICTY Appeals Chamber, Prosecutor v. Nikola Sainovic et al., IT-05-87-A, 23 January 2014, paras.1649–1650.

36 The judgment explains that, in many cases, evidence relating to other elements of aiding and abetting liability may be sufficient to demonstrate specific direction and thus the requisite culpable link (ibid., paras.37–40). This may be the case when the relevant acts are geographically or otherwise proximate to the crimes of principal perpetrators (e.g., when the aider and abettor is physically present when a person is being tortured or even encourages those acts). When the assistance is more remote from the principal's crimes, however, explicit evidence is needed to establish "specific direction". Interestingly, the Appeals Chamber observes

> that in most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators. In such circumstances, … evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary. (ibid., para.44)

Having established the need for explicit evidence of "specific direction" *in casu*, the Appeals Chamber in *Momčilo Perišić* finds that two inquiries are relevant to assessing whether assistance by the Yugoslav Army (VJ) to the Bosnian Serb Army (VRS) was "specifically directed" to facilitate the latter's criminal activities. Firstly: was the VRS an organization "whose sole and exclusive purpose was the commission of crimes"? In the affirmative, this would imply that any assistance to the VRS was by definition "specifically directed" towards VRS crimes. Secondly: did the VJ endorse a policy of assisting VRS crimes? In the end, both questions are answered in the negative. Thus, the Appeals Chamber stresses that, even if the VRS committed criminal acts, it was "not an organization whose actions were criminal per se; instead, it was an army fighting a war" (ibid., para.53). Secondly, it asserts that the VJ directed large-scale military assistance "to the general VRS war effort, not to the commission of VRS crimes" (ibid., para.57) and that the types of aid provided "do not appear incompatible with lawful military operations" (ibid., para.65). "Accordingly, specific direction of VJ aid towards VRS crimes is not the sole reasonable inference … even considering the magnitude of the VJ's assistance" (ibid., para.57).

non-international armed conflict on Syrian soil, and which are at the receiving end of the arms transfers, be reduced to mere "criminal organizations" (notwithstanding their repeated denunciation as terrorist groups by the Assad regime). In all, paraphrasing the ICTY, it appears that the assistance by third States is directed towards the "general war effort", rather than to the commission of international crimes. Such assistance would therefore seem incapable of giving rise to "aiding and abetting" liability on the part of third-State officials.[37]

III.B. State responsibility and complicity

13. Secondly, can third-State sponsors incur State responsibility for aiding or assisting in the commission of internationally wrongful acts?[38] According to Article 16 of the ILC Draft Articles on State Responsibility (DASR), such responsibility arises *if* (a) aid or assistance is provided with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by the State providing the aid.[39] There is no requirement that the aid or assistance should have been "essential" to the performance of the internationally wrongful act; as with "aiding and abetting", it suffices if it contributed significantly to that act.[40]

37 See also in this sense Kevin Jon Heller, Why the ICTY's "Specifically Directed" Requirement is Justified, Opinio Juris, 2 June 2013 (opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/).

38 In light of the information publicly available, it is assumed for present purposes that the anti-government forces operating in Syria are not "completely dependent" on a third-State sponsor (as that notion is understood in the case-law of the ICJ (see, e.g., ICJ, Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, paras.393–395 (hereinafter Bosnian Genocide). Nor are there any indications that these groups are "acting under on the instructions of, or under the direction or control of" third-State sponsors in the sense of art. 8 of the ILC Draft Articles on State Responsibility, Yearbook of the International Law Commission, 2001, vol. II, Part Two (DASR). This being said, insofar as one or more States have reportedly sent troops to Syria acting under their control (see above n.7), the conduct of the latter troops is in principle imputable to the sending States. If the cited reports are true, this would moreover imply that the State(s) concerned have(s)(ve) effectively become a party to the armed conflict. By contrast, it is recalled that mere logistical support (e.g., in the form of transfers) to one of the warring parties, is insufficient to turn the supporting third country into a party to the armed conflict. See Prosecutor v. Tadić, above n.34, para.137. Consider also Sylvain Vité, Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations, 91 IRRC (2009), 71.

39 International Law Commission, Commentary on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, YBILC (2001-II), 65.

40 Ibid., 66–67, paras.5, 10. The essential or incidental character of the assistance may nonetheless determine to what extent the assisting State should compensate for the act.

14. It is stressed that Article 16 DASR concerns a situation characterized by a relationship between two States.[41] Accordingly, while it is relevant for purposes of assessing the legality of arms transfers to the Assad regime (which is still widely regarded as the legal government of Syria at the time of writing—see below paras.34–38), it does not directly impact on the legality of arms transfers to anti-government forces. This might, however, be different if the latter were to become the new government of Syria. In such hypothesis, the prior conduct of the anti-government forces would from the outset be regarded as conduct of the Syrian State under international law as per Article 10 DASR. It could be argued that Article 16 DASR would then also apply retroactively to the aiding and assisting of the "insurrectional movement" having become the new government.

15. In any case, the question remains to what extent the arms transfers to the different parties to the Syrian civil war meet the substantive requirements of Article 16 DASR. If one were to look only at the express requirements of Article 16 DASR it would be tempting to conclude that they are indeed met. As mentioned before, third States are fully aware of the fact that all parties involved in the Syrian civil war commit widespread war crimes and that the provision of arms (but also, if perhaps les directly, the provision of non-lethal assistance and funding) facilitates the commission of these acts. Furthermore, it goes without saying that these acts would be wrongful under LOAC if committed by the assisting State itself.[42]

16. At the same time, the Commentary to Article 16 DASR indicates that State responsibility for aid or assistance is subject to a third restriction. In particular, the ILC Commentary specifies that "the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so".[43] This limits the application of Article 16 "to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended … to facilitate the occurrence of the wrongful conduct … ."[44] Crucially, the ILC Commentary acknowledges that this is a relevant factor vis-à-vis situations whereby States supply arms and other military assistance to countries found to be committing serious human rights violations. In such scenario, "the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of *and intended to* facilitate

41 Bosnia and Herzegovina v. Serbia and Montenegro, above n.38, para.420. See also Alexandra Boivin, Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons, 87 IRRC (2005), 474.

42 Alexandra Boivin, above n. 41, 473.

43 ILC, above n.39, 66, para.3.

44 Ibid., 66, para.5.

the commission of the internationally wrongful conduct" (emphasis added).[45] No further guidance is provided on how to interpret this "intent" criterion.[46]

17. It has been observed in the past that the intent criterion sets a high threshold to transform assistance in the form of the supply of weapons etc. into an internationally wrongful act of complicity.[47] Indeed, adducing proof of the assisting State's illegal intention will generally be extremely difficult, if not impossible. States remain free to claim that the furnished weapons were delivered not with the intention to facilitate the wrongful act in question, but rather for other reasons. The supporting State's motives could, for instance, be financial.[48] It is also possible that the third State provided support to "the general war effort" of the assisted party, without intending to facilitate the commission of war crimes (by analogy to the discussion concerning "aiding and abetting" liability above). For this reason, Article 16 DASR probably does not provide the strongest of legal grounds to contest the legality of arms transfers to the Assad regime (or to non-government forces, insofar as the latter were to become the legal government of Syria).[49]

18. Some have suggested easing the restrictions imposed by the "intent" criterion in relation to third States providing arms to a State committing grave breaches of LOAC and/or widespread human rights violations.[50] Sassoli, for instance, suggests that once a State knows that the receiving State "systematically commits violations of international humanitarian law with certain weapons, the aiding State has to deny further transfers thereof, even if those weapons could also be used lawfully".[51] Interestingly, Sassoli acknowledges that such a strict standard "may not be that of the ILC in its Commentary", but that it is supported by the special obligation to "ensure respect" for rules of

45 Ibid., 67, para.9.

46 The ICJ for its part in *Bosnian Genocide* questioned "whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator", yet ultimately left the matter undecided. Bosnian Genocide, above n.38, para.421.

47 See, e.g., Bernhard Graefrath, Complicity in the Law of International Responsibility, Revue Belge DI (1996), 375.

48 See, e.g., Alexandra Boivin, above n.41, 471–472.

49 Again the objective of third-State sponsors would indeed appear to consist primarily in supporting the general war effort, rather than in assisting in the commission of war crimes.

50 Graefrath, for instance, while acknowledging that a State cannot always guarantee that transferred weapons are not used for unlawful purposes, suggests that there ought to be a "presumption of intention" whenever an organ of the international community (e.g., the UNGA or UNSC) has established that a threat to the peace or a violation of international or an infringement of *erga omnes* obligations exists. See Bernhard Graefrath, above n.47, 377.

51 Marco Sassoli, State Responsibility for Violations of International Humanitarian Law, 84 IRRC (2002), 413.

LOAC.[52] Rather than to suggest a broad reading of Article 16 DASR as such, Sassoli seems to touch upon a distinct norm, and one which may indeed provide a firmer basis to contest the legality of arms transfers to the parties in the Syrian civil war than Article 16 DASR itself, notably the duty to "ensure respect" for LOAC.

19. Before turning to this duty to "ensure respect" for LOAC, however, reference must be made to Articles 40 and 41 DASR dealing with "serious breaches of obligations under peremptory norms of general international law", in particular to Article 41(2) DASR which provides that "no State shall recognize as lawful a situation created by" such a breach and that no State shall "render aid or assistance in maintaining that situation". Considering that the International Law Commission (ILC) regards the cited Articles as extending to gross or systematic breaches of the prohibition of torture as well as of the basic rules of the law of armed conflict,[53] the question arises to what extent Article 41(2) DASR poses more far-reaching restraints on the provision of assistance to States or NSAGs committing grave breaches of LOAC than Article 16. The ILC Commentary is somewhat ambiguous on this point. On the one hand, it states that "as to the elements of 'aid or assistance', Article 41 is to be read in connection with Article 16".[54] On the other hand, the Commentary stresses that "knowledge" of the circumstances of the internationally wrongful conduct can be presumed in the context of a serious breach of *jus cogens*, "as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State".[55] Interestingly, no reference is made in the ILC Commentary to the requirement that the aid or assistance should be "intended to" maintain the unlawful situation. This can be seen an indication that the "intent requirement" (mentioned in the Commentary to Article 16 DASR) does not apply in relation to Article 41(2) DASR (thus resulting in an enlarged scope). On a different note, it is questionable whether Article 41(2) DASR effectively applies to the provision of weapons and other support to parties in a non-international armed conflict. Firstly, like Article 16 DASR, Article 41(2) DASR only extends to aid or assistance supplied to *another State* (and not to aid to an NSAG—save in the Article 10 DASR scenario—see above para.14). Secondly, and more fundamentally, the provision deals with aid or assistance provided "after the fact", which "maintains" a "situation" created by a serious breach of *jus cogens* (e.g., a situation of unlawful annexation or a policy of apartheid). Such scenario seems to be materially different from the one envisaged here, viz. the setting where one or more parties to an armed conflict engage in

52 Ibid.

53 See ILC, above n.39, 113, para.5 (referring to ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion, ICJ Reports 1996, 226–267, para.79). Consider also ICJ, Jurisdictional immunities of the State (Germany v. Italy), Judgment, ICJ Reports, 1–51, para.93.

54 ILC, above n.39, 115, para.11.

55 Ibid.

systematic violations of LOAC (without the use of armed force by the State against rebel groups as such qualifying as a breach of *jus cogens*).

III.C. The duty to "respect and ensure respect" with LOAC

20. Thirdly, Common Article 1 of the four Geneva Conventions refers to the obligation to "respect and to ensure respect" for the Conventions in all circumstances. A similar obligation can be found in Article 1(1) of the First Additional Protocol ("AP I"). The International Committee of the Red Cross (ICRC) Customary Study asserts that the obligation "to respect and ensure respect" for LOAC is a norm of customary law that applies to international and non-international armed conflicts alike.[56]

21. The scope of the obligation to "ensure respect for" LOAC has given rise to considerable debate in past years. Intense discussion has arisen on the question whether States not party to an armed conflict are under a *positive* obligation to take measures so as to "ensure" that the belligerent parties respect LOAC.[57] In a recent article focusing on military support to anti-Gaddafi rebels during the 2011 conflict in Libya, however, Corten and Koutroulis stress that the debate on whether or not the obligation to "ensure" respect must be read broadly or restrictively is immaterial in a situation where a State actively supports an LOAC offender.[58] Indeed, according to the authors, the fact that the obligation to "ensure respect" for LOAC encompasses a duty to abstain from supporting a party to the conflict that violates LOAC—whether a State or an NSAG[59]—"is not really in doubt".[60] In light of the fact that States that provided weapons knew that the Libyan rebels were committing grave breaches of LOAC, the authors conclude that supporting States violated their obligation to ensure respect for LOAC.

56 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law (2005), Vol. I (Rules), 495 et seq. See also Maya Brehm, above n.22, 372.

57 See, e.g., Luigi Condorelli and Laurence Boisson de Chazournes, Quelques remarques à propos de l'obligation des États de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances", in Christophe Swinarski (ed.), Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet (1984), 17–35 ; Frits Kalshoven, The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit, 2 YIHL (1999), 3–61; Carlo Focarelli, Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?, 21 EJIL (2010), 125–171.

58 Olivier Corten and Vaios Koutroulis, The Illegality of Military Support to Rebels in the Libyan War: Aspects of *Jus Contra Bellum* and *Jus In Bello*, 18 J. Conflict and Security L. (2013), 84.

59 Note that this distinguishes the scope of the duty to "respect and ensure respect" from that of DASR, above, n.38, arts 16 and 41(2).

60 Olivier Corten and Vaios Koutroulis, above n.58, 85.

22. If one were to apply the foregoing reasoning to the case at hand, it is clear that the outcome must be identical, and that weapons transfers to the Assad regime and to the Free Syrian Army (or other rebel groups) are similarly at variance with the obligation to ensure respect for LOAC. Some caution is nonetheless in order. Firstly, if the existence of an absolute duty for third States to abstain from supporting a party to an armed conflict that violates LOAC has a certain logical appeal,[61] the evidence is not as unequivocal as one might think. No express reference to such duty is made in the Commentary to the 1949 Geneva Conventions (GCs). Moreover, the ICRC Customary Study describes the duty to "respect and ensure respect" in rather restrictive terms, without pronouncing on the existence of a customary duty to refrain from assisting international humanitarian law (IHL) offenders.[62] What about the ICJ cases tackling the duty to "respect and ensure respect for" LOAC? In the *Nicaragua* case, the ICJ derived from Common Article 1 GC an obligation "not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of" Common Article 3 GC.[63] The Court found that the United States had effectively violated this obligation by producing and disseminating to the *contras* a manual on psychological operations encouraging the "neutralization" of certain carefully selected and planned targets, including judges, police officers, etc., in breach of LOAC.[64] In other words: the Court condemned the "encouragement" of acts contrary to LOAC on the basis of the duty to "ensure respect". By contrast, the supply of arms and funding to the *contra* forces was condemned as a breach of the principle of non-intervention, but was not dealt with under the rubric of the duty to "ensure respect". In the *Wall in Palestine* Advisory Opinion, the Court stated in general terms that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in

61 Insofar as States are supposed to take positive steps to prevent breaches of LOAC (whatever the exact content of that obligation), it is only logical that they should a fortiori refrain from knowingly facilitating—whether intentionally or not—the commission of such breaches.

62 Jean-Marie Henckaerts and Louise Doswald-Beck, above n.56, 495 et seq. (Rule 139: "Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control."). In a similar vein, the lion's share of evidence compiled in ibid., Vol. II (Practice), concerns the duty of States to "ensure respect" by issuing orders and instructions to regular and irregular forces under their control. None of the cited evidence relates to the provision of assistance by third-States to LOAC offenders. See Jean-Marie Henckaerts and Louise Doswald-Beck, above n.56, Vol. II (Practice), 3180–3187. See also the relevant practice compiled in the ICRC Customary Database in relation to "Rule 139" (www.icrc.org/customary-ihl/eng/docs/v2_rul_rule139).

63 ICJ, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. USA), Judgment, ICJ Reports 1986, para.219.

64 Ibid., paras.255–256.

maintaining the situation created by such construction",[65] while adding that "all the States parties to [GC IV] are under an obligation … to ensure compliance by Israel with international humanitarian law as embodied in that Convention." The foregoing quote at first sight indicates that Common Article 1 GC not only rules out the "encouragement" of breaches of LOAC, but more generally bans any form of aid or assistance to LOAC offenders. It must nonetheless be observed that the Court, while referring to Common Article 1 GC (para.158), is actually paraphrasing the text of Article 41(2) DASR (para.159). It is therefore not entirely clear to what extent the section of the quote dealing with "aid or assistance" can be regarded as an application of Common Article 1 GC, or Article 41(2) DASR, or both.[66] Insofar as the Court's dictum on the duty "not to render aid or assistance …" was based on Article 41(2) DASR, it must be recalled that this provision applies to State-to-State support only, and moreover has a specific scope, and is therefore not necessarily applicable to transfers of arms to LOAC offenders as such (see above para.19).

23. In the present context, the author ultimately agrees that there is credible support for the existence of a customary norm, based on the overarching obligation to "ensure respect" for LOAC, and which forbids the provision of arms to LOAC offenders. Thus, reference can be made to the growing number of international instruments that effectively exclude the transfer of arms when there is a substantial risk that these will be used for the commission of serious violations of LOAC. Such instruments include, for instance, the Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons,[67] the Organization for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons,[68] or EU Council Common Position 2008/944/CFSP,[69,70] While not all of these instruments are legally binding in nature, they do constitute relevant State practice and *opinio iuris* in the present context. Furthermore, on 2 April 2013, the UN General Assembly adopted the landmark Arms Trade Treaty (ATT) with 154 votes in favour,

65 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 1994, para.159 and para.D of the *dispositif*.

66 Cf. Judge Kooijmans in his Separate Opinion seems to regard the first sentence as an application of DASR, above n.38, art. 41, and the second sentence (on the duty to ensure compliance with GC IV) as an application of Common Article 1 GC. Wall in Palestine, above n.65, Separate Opinion of Judge Kooijmans, paras.40 et seq.

67 ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other related materials, Abuja, 14 June 2006, art. 6(3).

68 OSCE Document on Small Arms and Light Weapons, 24 November 2000 (www.osce.org/fsc/20783), Section III(A)(2).

69 Council Common Position 2008/944/CFSP, above n.20.

70 For other examples, see, e.g., ICRC, Arms Transfer Decision: Applying International Humanitarian Law Criteria—Practical Guide, Geneva, June 2007 (www.icrc.org/eng/assets/files/other/icrc_002_0916.pdf), 4.

and only three votes against.[71] According to Article 6(3) ATT, "a State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilian objects protected as such, or other war crimes as defined by international agreements to which it is Party." Even if the ATT has not yet entered into force (at the time of writing it was signed by 115 States and ratified by eight),[72] the inclusion of the aforementioned provision can arguably be seen as the crystallization of a customary norm, finding its basis in the duty to "ensure respect" for LOAC, and prohibiting the transfer of arms to known LOAC offenders. Furthermore, while State practice is hardly consistent, the author is not aware of any contrary *opinio*, for example in the form of declarations of States explicitly defending the legality of arms transfers to known LOAC offenders.

24. On the basis of the foregoing, it can be concluded that Common Article 1 GC indeed encompasses an obligation to refrain from providing certain aid or assistance to States or NSAGs that commit grave breaches of LOAC. The scope of this obligation, however, still requires clarification. Firstly, isolated breaches of LOAC are arguably insufficient to trigger the obligation. At the same time, if it may not always be obvious whether (the risk of) breaches of LOAC are(/is) sufficiently serious,[73] no such problems arise in the present context inasmuch as the periodic reports of the Commission of Inquiry clearly demonstrate a pattern of systematic disregard for LOAC on the part of all warring parties. Secondly, what types of aid/assistance are forbidden on the basis of Common Article 1 GC and to what extent must there be a direct link between the nature of the support and the commission of breaches of LOAC? It is submitted that obligation applies not only to the transfer of arms that are inherently unlawful (e.g., explosive bullets or chemical weapons), but extends to all weapons and ammunition—irrespective of the fact that such weapons may also be used in a lawful manner (by LOAC standards). By contrast, non-lethal assistance, e.g., in the form of body armour or armoured personnel carriers (APC), may not be covered by the obligation. It is noted, for instance, that such non-lethal assistance does not come within the scope of, for instance, the Arms Trade Treaty (Article 2(1) ATT refers to "armoured combat vehicles", but not to APCs) or the ECOWAS Convention on Small Arms and Light Weapons. More controversially: what about certain advanced weaponry, such as anti-aircraft systems or anti-ship cruise missiles? Recall that such arms were

71 Notably Syria, Iran and the Democratic Republic of Korea voted against. Twenty-three States abstained from voting.

72 Signatory States include France, the United Kingdom and the United States. By contrast, at the time of writing, the Treaty had not been signed by Iran, Qatar, Russia or Saudi Arabia. (See disarmament.un.org/treaties/t/att/deposit/asc).

73 Maya Brehm, above n.22, 376.

effectively supplied by Russia to the Assad regime in 2012 and 2013.[74] On the one hand, it is noted that such weapons are fully covered by the Arms Trade Treaty and various other instruments. On the other hand, some of these weapons are unlikely to be linked to the commission of grave breaches of LOAC. It is noteworthy that, in the face of criticism pursuant to a delivery of anti-ship cruise missiles to Damascus, Russian Foreign Minister Lavrov stressed that these supplies did not violate any international agreements, underscoring specifically that Russia was not selling to the Syrian government any offensive weapons that could be used to kill civilians.[75] And what about the provision of financial support? Must one conclude that there is insufficient customary evidence to support the view that Common Article 1 GC entails an absolute ban to provide funding to known LOAC offenders? Or should one conclude that such funding is excluded by Common Article 1 GC, unless there are sufficient guarantees that the funds will be used for purposes extraneous to the conduct of hostilities and will not contribute to the commission of grave breaches? The latter question brings us to a third and last aspect that requires clarification: can States absolve themselves of their responsibility under Common Article 1 GC by taking certain steps aimed at reducing the risk that the weapons being supplied are used in contravention of LOAC? The duty to "ensure respect" for LOAC is often construed as an obligation to exercise "due diligence" to a degree that is commensurate with a State's control over the other party (whether a State or an NSAG).[76] It may moreover be recalled that the EU Council Declaration on Syria[77] of 27 May 2013, which, at least theoretically, opened the door to arms exports to anti-government forces in Syria, provided that Member States "shall require adequate safeguards against misuse of authorisations granted, in particular relevant information concerning the end-user and final destination of the delivery". Reference can also be made to the useful list of indicators identified in the ICRC's "Practical Guidance" on arms transfer decisions.[78] These indicators include, for example, the existence of formal commitments to comply with LOAC; the dissemination of the rules of LOAC to combatants and the inclusion of these rules in manuals and instructions, and, the capacity of the recipient to maintain strict and effective control over its arms and military equipment and their further transfer. At the same time, it is clear that the fulfilment of some of these indicators should not serve as a fig leaf for transfers of arms

74 See Melanie De Groof, above n.3, 36.

75 Tom Parfitt, above n.17.

76 See, e.g., Marco Sassoli, above n.51, 412; Alexandra Boivin, above n.41, 479. Consider also in a related context Bosnian Genocide, above n.38, para.430. Corten and Koutroulis implicitly acknowledge that States can theoretically absolve themselves by exerting their influence to stop violations of LOAC: Olivier Corten and Vaios Koutroulis, above n.58, 91.

77 Council of the EU, Council Declaration on Syria, above n.9.

78 ICRC, above n.70, 5 et seq.

where it is reasonably foreseeable that the arms may eventually be used for the commission of crimes against humanity and/or war crimes. Thus, given the situation on the ground at the time of writing, the fact that the Free Syrian Army has issued a "Proclamation of Principles" stating that it would uphold LOAC,[79] hardly impacts the analysis under Common Article 1 GC. Nor does, for instance, the commitment of the UK to "fund training to help armed groups understand their responsibilities and obligations under international law and international human rights standards",[80] seem to substantially affect the obligation to refrain from supplying weapons to rebel groups known to have committed serious violations of LOAC. In all, especially when considering that the degree of control of the FSA's Supreme Military Command over the different member groups and affiliated groups operating under its umbrella is most questionable,[81] it is difficult to see how EU Member States could obtain adequate safeguards that arms transferred to the FSA are not used in contravention of LOAC.

25. In short, on the basis of the information publicly available, there are credible reasons to believe that various States have breached the obligation to ensure respect for LOAC, as enshrined in Common Article 1 GC, by transferring arms to the Assad regime or to anti-government forces.

IV. The prohibition on the use of force and the duty of non-intervention

IV.A. Transfers of arms

IV.A.i. General

26. If the foregoing section dealt with the impact of the widespread and mutual disregard for LOAC on the legality of third-State assistance, the present section makes abstraction of these breaches and instead looks at this assistance from the perspective of the prohibition on the use of force and especially the duty of non-intervention, having regard to the exceptions thereto.

The obvious starting point for such assessment is the *Nicaragua* case, where the Court applied the customary equivalent of Article 2(4) UN Charter, as well as the duty of non-intervention, to the US support for the contras in Nicaragua. Referring to the section of the United Nations General Assembly (UNGA) Friendly

79 The Proclamation of Principles is available via the website of the Syrian Opposition Council Fact Sheet, above n.5.

80 Foreign Secretary Statement to Parliament on Syria, 6 March 2013 (www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-syria).

81 See, e.g., Syria crisis: guide to opposition, above n.28. The future of the Free Syrian Army, Al Jazeera, 6 October 2013.

Relations Declaration[82] dealing with the principle of the non-use of force, and even if, "on its face, Article 2(4) UN Charter would not seem to reach the mere arming of rebels",[83] the Court concludes that the "arming and training" of armed groups may qualify as a "threat or use of force".[84] Other forms of support are not deemed to be covered by the prohibition on the use of force, although the Court asserts that, "the mere supply of funds" undoubtedly constitutes an act of intervention in the internal affairs of the other State.[85] In the *dispositif*, the Court finds that the USA "by training, arming, equipping, financing and supplying the contra forces … has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State."

In light of the Court's judgment, and having regard to the 1965 Declaration on the Inadmissibility of Intervention,[86] the 1970 UNGA Friendly Relations Declaration, as well as the 1981 Declaration on the Inadmissibility of Intervention,[87] it is now commonly accepted that the provision of weapons and military training to NSAGs in another State infringes both the prohibition on the use of force and the duty of non-intervention, whereas the provision of other support may give rise to a breach of the duty of non-intervention (see below paras.56–62). Accordingly, arms transfers to anti-government forces in Syria at first sight violate Article 2(4) UN Charter as well as the duty of non-intervention. As far as arms transfers to the Assad regime are concerned, such conclusion is less obvious, since international law in principle accepts that a *de jure* government can invite third States to provide support in the form of the sending of military troops and *a fortiori* in the form of weapon supplies and other support. We will come back to the boundaries of such "interventions by invitation" below (see paras.56–62).

IV.A.ii. Humanitarian intervention

27. If the transfer of arms to Syrian rebel groups would at first sight appear to flout Article 2(4) UN Charter and the duty of non-intervention, the question arises whether it may nonetheless benefit from an exception to those norms. Some potential justifications can be dismissed fairly easily. For instance, there is clearly no "armed attack" imputable to the Assad regime against a third State that would somehow have warranted the large-scale supply of arms to the FSA or other rebel groups as an

82 GA Res. 2625 (1970), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

83 Michael N. Schmitt, above n.31, 141.

84 Nicaragua case, above n.63, para.228.

85 Ibid.

86 GA Res. 2131(1965), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.

87 GA Res. 36(103) (1981), Declaration on the inadmissibility of intervention and interference in the internal affairs of States.

application of the right of self-defense (Article 51 UN Charter),[88] whether by the actual victim or by other States acting in "collective" self-defense.[89] Nor has the UN Security Council sanctioned the transfer of arms to these groups.

28. Following the reprehensible chemical weapons attack of 21 August 2013 near Damascus, at a moment when the United States, France and, initially, the United Kingdom, strongly hinted at an actual military intervention in Syria, it was suggested from various corners that such intervention would have been lawful on the basis of the "doctrine of humanitarian intervention". This was, for instance, the position put forward by the UK in a short "government legal position" published on 29 August 2013.[90] A similar argument was voiced—after the threat of an actual intervention had faded due to a Russian-brokered deal whereby Damascus agreed to dismantle its chemical arsenal under OPCW supervision[91]—by, among others, former US Legal Advisor Harold Koh.[92] While this is not the proper place to revisit in detail the arguments relating to the legality of (unilateral) humanitarian intervention,[93] it suffices to note that there is at present arguably insufficient State practice and *opinio iuris*—having regard, for instance, to the fact that most NATO Member States were themselves reluctant to set a precedent as well as to the G-77 rejection of humanitarian intervention in the wake of the 1999 Kosovo crisis—to conclude that the doctrine is accepted *de lege lata*. In addition, while the suffering of the Syrian civilian population can hardly be underestimated and the brutality of the chemical weapons attack of 21 August 2013 is staggering, the Syrian civil war differs from, for instance, the Kosovo crisis, in that

88 There have reportedly been a number of armed incidents on the Syrian-Turkish border. These incidents would, however, not seem to be of a nature to warrant anything beyond immediate on-the-spot-reaction.

89 In a similar sense, see Michael N. Schmitt, above n.31, 147.

90 Downing Street, Guidance. Chemical Weapon use by Syrian Regime: UK Government Legal Position, 29 August 2013 (www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version).

91 The agreement was welcomed by the UN Security Council in SC Res. 2118 (2013), 27 September 2013.

92 Harold Koh, Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward), Just Security, 2 October 2013 (justsecurity.org/2013/10/02/koh-syria-part2/). More generally (without pronouncing on the Syrian case as such), see Daniel Bethlehem, Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention, EJIL:Talk! blog, 12 September 2013 (www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/).

93 See, e.g., Olivier Corten, Law Against War (2010), 495–549; Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law (2003); Simon Chesterman, Just War or Just Peace?: Humanitarian Intervention and International Law (2001).

the Assad regime—while arguably guilty of large-scale war crimes and massive human rights violations—does not appear to have engaged in an actual policy of ethnic cleansing or genocide. On a different note, it would appear perverse to invoke the doctrine of humanitarian intervention as a justification for the supply of weapons to NSAGs that are themselves known to commit serious violations of LOAC.

IV.A.iii. Self-determination

29. Another potential legal justification that has been hinted at,[94] relates to the right of self-determination. In the 1960s and 1970s, several (mainly developing and socialist) countries indeed took the view that certain peoples being denied their right of self-determination had the right to use armed force in their pursuit of this right as well as the concomitant right to seek and receive support, possibly including armed assistance, from other States.[95] This resulted among other things in the adoption by the UN General Assembly of an annual resolution explicitly affirming "the legitimacy of the people's struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle".[96]

30. The suggestion that arms transfers to Syrian rebel groups could be construed as lawful support for a people struggling to achieve its right of self-determination must, however, be dismissed for several reasons.

31. Firstly, if, throughout the 1960s and 1970s several States indeed argued in support of a right to provide assistance, including in the form of arms (and possibly even the actual sending of troops), it must be noted that the discussion was never authoritatively settled. While the argument was repeatedly put forward, including in the negotiations preceding the adoption of the Friendly Relations Declaration and the Definition of Aggression, States refrained from claiming a right to provide armed support to national liberation movements in concrete situations.[97] Moreover,

94 See Dapo Akande, above n.13 (Akande ultimately dismisses this potential justification).

95 See, e.g., UN Doc. A/AC.125/SR97-109, 24–27 (Soviet Union), 39 (Romania), 44–45 (Czechoslovakia), 59 (Madagascar), 89, 101 (Kenya); UN Doc. A/AC.125/SR.110-114, 51 (Yugoslavia), 59 (Kenya), 62–63 (Soviet Union), 64–65 (Syria), 78 (United Arab Republic); UN Doc. A/C.6/25/SR.1182, paras.16 (Afghanistan); 47 (Libya); UN Doc. A/C.6/25/SR.1203, para.11 (Uganda); UN Doc. A/C.6/25/SR.1204, para.5 (Syria); UN Doc. A/C.6/25/SR.1205, paras.38 (Gabon), 40 (Ghana); UN Doc. A/C.6/25/SR.1206, paras.50 (Afghanistan), 71 (Cuba); UN Doc. A/C.6/28/SR.1442, paras.21 (Kenya), 52 (Indonesia); UN Doc. A/AC.134/SR.52-66, 60 (United Arab Republic); UN Doc. A/AC.134/SR.67-78, 97 (Ghana).

96 See, e.g., GA Res. 3070 (1973); GA Res. 3246 (1974); GA Res. 3382 (1975); GA Res. 31/34 (1976).

97 Tom Ruys, "Armed Attack" and Article 51 of the UN Charter—Evolutions in Customary Law and Practice (2010), note 283, p. 420.

numerous other (western) States objected that international law did not sanction giving military support or arms to peoples struggling for self-determination.[98] The divergence of opinion is reflected in the relevant provisions of both the Friendly Relations Declaration and the Definition of Aggression, which refrain from taking a clear stance, instead referring in a circular manner to the right of peoples struggling for self-determination to "seek and to receive support in accordance with the purposes and principles of the Charter".[99] Legal doctrine has similarly remained divided over the issue.[100] With the end of the colonial era, the debate eventually retreated to the background.

32. Secondly, the right to "seek and to receive support" (whatever its precise content), has always been restricted to peoples entitled to a right of external self-determination, viz. peoples under colonial and racist regimes or other forms of alien domination—a reading that finds support in the wording of the Friendly Relations Declaration and the Definition of Aggression.[101] By contrast, it has never been extended to peoples being denied a meaningful exercise of their right of *internal* self-determination. Unsurprisingly, State practice suggests that there is no appetite among States to set a precedent in this context. It is indicative, for instance, none of the NATO Member States taking part in the military campaign against Serbian forces during the 1999 Kosovo crisis went as far as to suggest that the operation could be justified by reference to the right of self-determination of the people of Kosovo.

33. Thirdly, even if it were accepted that peoples struggling for self-determination have a right to seek and receive support in the form of arm transfers from third States (a question that was never truly settled), and even if it were accepted that this right extends to scenarios of "internal self-determination" (*quod non*), it would still remain inapplicable in the current setting. The scenario under consideration indeed differs from, for instance, the circumstances of the Kosovo case: even if it has evolved increasingly along sectarian lines, the Syrian conflict was not spurred by the discrimination of one group on the grounds of, for instance, race or religion; rather it is a classic case of individuals taking up arms to rebel against an undemocratic and authoritarian

98 See, e.g., UN Doc. A/AC.125/SR.110-114, 63 (Australia), 74 (UK), 83 (USA); UN Doc A/C.6/25/SR.1184, paras.15–16 (South Africa); UN Doc. A/C.6/25/SR.1207, para.50 (Portugal).

99 GA Res. 2625 (1970), above n.82, para.5 of the section on the principle of equal rights and self-determination of peoples; Definition of Aggression, Annex to GA Res 3314 (1974), art. 7. See also Robert Rosenstock, The Declaration on Principles of International Law Concerning Friendly Relations: A Survey, AJIL (1971), 732–733; Benjamin Berell Ferencz, Defining International Aggression. The Search for World Peace: A Documentary History and Analysis (1975), Vol. II, 49.

100 For references, see Tom Ruys, above n.97, notes 287–288, p. 420.

101 Also in this sense, see Michael N. Schmitt, above n.31, 153; Stefan Talmon, Recognition of Opposition Groups as the Legitimate Representative of a People, 12 Chinese JIL (2013), note 88, p. 420.

regime, resulting in a fully fledged civil war. The foregoing is not altered by the fact that dozens of States have recognized the Syrian Opposition Council as the/a legitimate representative(s) of the Syrian people. As Talmon points out, "a single people within a State does not enjoy a right of internal self-determination against its own State or government".[102]

In sum, the right of self-determination cannot justify arms transfers to the FSA or other rebel groups.

IV.A.iv. Recognition of the Syrian Opposition Council as the new de jure *government*

34. On a related note, in the context of the discussions at the EU level on a possible lifting of the arms embargo, some States appeared eager to find creative ways to circumvent the prohibition on the use of force and the duty of non-intervention so as to justify the supply of arms to anti-government forces in Syria. The Dutch government for instance, in a letter to the House of Representatives declared as follows (author's translation):

> The cabinet understands that, in case the legitimacy of the regime in power decreases and that of the armed opposition increases, the duty of non-intervention is under pressure. … The lack of legitimacy of the Assad regime and the broad recognition of the [Syrian Opposition Council] as the legitimate representative of the Syrian people have led the government to conclude that the supply of military equipment to the SOC, in exceptional cases and under specific conditions, need not be contrary to international law.[103]

Several months before, the French President Hollande, during a press conference announcing the recognition of the SOC as the sole legitimate representative of the Syrian people, had already noted that the question of arms supplies to the rebels would be looked at "as soon as [the SOC would become] a legitimate government of Syria".[104] The foregoing statements implicitly mirror the idea, subscribed to by Schmitt among others,[105] that the transfer of arms to the Free Syrian Army—which can to certain extent be regarded as the military wing of the Syrian Opposition Council—would be lawful if the SOC were to be/become the *de jure* government of Syria. This idea evokes several comments.

102 Stefan Talmon, above n.101, 235–236.

103 Letter by the Dutch Foreign Minister to the House of Representatives, Volkenrechtelijke aspecten sanctieregime Syrië, 4 June 2013 (www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/06/04/kamerbrief-over-de-volkenrechtelijke-aspecten-van-het-sanctieregime-tegen-syrie.html).

104 Syria: France Backs Anti-Assad Coalition, BBC News, 13 November 2012.

105 Michael N. Schmitt, above n.31, 151. Apparently also accepting this position: Dapo Akande, above n.13.

35. Firstly, one must not lose sight of the difference between the recognition of a rebel group as the new *de jure* government on the one hand, and the recognition of such group as "a/the sole legitimate representative of (the legitimate aspirations of) its people", on the other hand.[106] The former is a "legal" act of recognition, by which the non-State group comes legally into existence as a government in relation to the recognizing State, which recognizes it as the sole legal representative of the State, entitled to act on its behalf. By contrast, the latter is a "political" act, which generates (limited) practical effects, but no direct legal effects.[107] Such political recognition paves the way for more direct and formal communications with the opposition group (for instance, via the creation of liaison offices) or for increased practical support to the group. And while it will go hand in hand with reduced political/diplomatic relations between the recognizing State and the *de jure* government, the legal relationship between the two is left unaltered. This also means that the recognizing State remains bound vis-à-vis the *de jure* government to the prohibition on the use of force and the duty of non-intervention, effectively prohibiting the transfer of arms to NSAGs combatting the government.[108] In the present case, while it has frequently been asserted that the Syrian Opposition Council has been "recognized" by over a hundred States, closer scrutiny of the respective declarations reveals that these are of a political nature and do not tend to identify the SOC as the new *de jure* government of Syria.[109] For this reason alone, it is obvious that these recognitions cannot justify arms transfers to the SOC (and its military wing the FSA).[110]

36. Secondly, it must be recalled that the recognition of *de jure* governments is not a purely discretionary act, subject only to the subjective considerations of the recognizing State(s). Rather, "government" status is a legal concept, which presupposes that the

106 See on this Stefan Talmon, above n.101.

107 See, e.g., US State Department, Daily Press Briefing, 12 December 2012 ("[T]his is a political step. This is not a legal step … .").

108 Also in this sense, see Stefan Talmon, above n.101, 244.

109 See ibid., Annex II (Table of recognitions of the Syrian Opposition Coalition). Only in relation to Qatar does Talmon (writing in February 2013) find that it has implicitly recognized the SOC as the new *de jure* government (to the exclusion of the Assad regime) by turning over the Syrian embassy in Doha to the SOC and by accepting the appointment of the SOC representative as the new Syrian ambassador. Ibid., 244–245. Note, however, that following the suspension of Syria's membership of the League of Arab States, the League in March 2013 formally invited the Syrian Opposition Council to take up Syria's vacant seat. Hala Droubi and Rick Gladstone, Syrian Opposition Joins Meeting of Arab League, NY Times, 26 March 2013.

110 Before the House of Commons, UK Secretary of State William Hague stressed that "[t]here is no automatic change in our policy on [the active arming of the Syrian opposition] as a result of the recognition of the Syrian opposition." UK Parliament, House of Commons, Official Report, Parliamentary Debates, vol. 553, col. 452, 20 November 2012.

individual or group of individuals claiming to be the government of a State exercise effective control over all or most of the State's territory and is likely to continue to do so.[111] Premature recognition of a new *de jure* government, absent such effective control, is a tortious act against the lawful government in breach of international law.[112] The traditional position in the context of a non-international armed conflict, elaborated by Lauterpacht in 1947, indicates a presumption in favour of established governments:

> In one respect …, the presumption in favour of the lawful government is above controversy: the latter is entitled to continued recognition de jure so long as the civil war, whatever its prospects, is in progress. So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the de jure recognition of the revolutionary party as a government constitutes premature recognition which the lawful government is entitled to regard as an act of intervention contrary to international law. [113]

37. This continues to be the generally accepted position in legal doctrine up-to-day.[114] The implication in the present context is that—having regard to the fact that the Syrian civil war had reached a military deadlock at the time of writing, as well as to the fact that the Assad regime retained control over substantial parts of the national territory, including the capital Damascus—any recognition of the SOC as the *de jure* government would have been premature, and thus unlawful.

Interestingly, the careful wording chosen by States "recognizing" the Syrian Opposition Council (referring to the SOC as "a/the legitimate representative(s) of (the aspirations of) the Syrian people", rather than as the Syrian "government"), rather than undermining this position, would seem to strengthen it. It is noteworthy, for instance, that the United States has asserted that it has not recognized the SOC as the legal government of Syria,[115] emphasizing that such legal recognition "goes to the question of physical control over territory".[116] In all, the case of the Syrian civil war (and arguably

111 See, e.g., Stefan Talmon, above n.101, 232; James Crawford, Brownlie's Principles of Public International Law (8th edn. 2012), 152.

112 Hirsch Lauterpacht, Recognition in International Law (1947), 95.

113 Ibid., para.38.

114 See, e.g., American Law Institute, Restatement of the Law—Third. The Foreign Relations Law of the United States (1990), §203. Consider also Institut de Droit International, The Principle of Non-intervention in Civil Wars, Resolution Adopted at Wiesbaden on 14 August 1975 (www.idi-iil.org/idiE/resolutionsE/1975_wies_03_en.pdf), art. 2 (hereinafter IDI).

115 US Department of State, Digest of United States Practice in International Law 2012 (www.state.gov/documents/organization/211955.pdf), 281.

116 US State Department, Daily Press Briefing, 12 December 2012.

also that of the conflict in Libya in 2011[117]) confirms that States regard premature recognition of a rebel group as the new *de jure* government as unlawful.

38. Thirdly, several authors have warned that if the aforementioned presumption in favour of the established government were to be abandoned, this would imply that States could (prematurely) recognize an NSAG as the new *de jure* government (merely) with a view to being able to lawfully grant arms and other assistance to that group.[118] This would render the prohibition on the use of force and the duty of non-intervention meaningless in this context, as it would enable different (third) States to recognize different (competing) groups as the *de jure* government based on their own interests and subjective considerations, and to supply the recognized group with arms and other assistance. Put differently: in the present context (and leaving aside the other legal objections discussed in previous sections), it would mean that, subject to the required legal recognition, both arms transfers by Qatar, Saudi Arabia and others to the FSA, as well as arms transfers by Russia and Iran to the Assad regime, would be equally lawful. It must be stressed, however, that the foregoing scenario starts from two assumptions: (1) firstly, that "premature" recognition is not unlawful, and (2) secondly, that it is lawful to supply arms and other assistance to the *de jure* government. If the first assumption was dismissed above, the second merits closer

117 See in this sense Stefan Talmon, Recognition of the Libyan National Transitional Council, 16 June 2011, ASIL Insight, 15-16 ("Despite being generally sympathetic to the cause of the NTC, … the United States and other countries have been very conscious of the international law implications of a decision to formally 'recognize' the NTC in any legally relevant manner and, so far, have—it is submitted, correctly—refrained from doing so."). In relation to political recognition of the Libyan National Transitional Council in 2011, the US Legal Adviser declared as follows:

> [I]nternational law focuses on the question of recognition, and recognition tends to follow facts on the ground, particularly control over territory. As a general rule, we are reluctant to recognize entities that do not control entire countries because then they are responsible for parts of the country that they don't control, and we're reluctant to derecognize leaders who still control parts of the country because then you're absolving them of responsibility in the areas that they do control. (US Senate, Committee on Foreign Relations, Libya and War Powers, Hearing, S. Hrg. 112189, 28 June 2011, 39)

118 Hersch Lauterpacht, above n.112, 95:

> If States could proceed in this matter regardless of what is now a well-established legal principle, the result might be that in case of a civil war in a foreign country or, for that matter, even before actual hostilities have taken place there on a larger scale, there would be nothing to prevent any State so minded from withdrawing recognition from the established government and transferring it to the rebellious party, with all the far-reaching consequences of the change thus affected in the legal position. The result, in international law, would be to reduce the established government to the status of a rebellious group and to raise the newly recognized authority to the position of the legitimate government to which support and encouragement may lawfully be given.

See also Dapo Akande, above n.13; Olivier Corten and Vaios Koutroulis, above n.58, 65–66.

scrutiny—also because it directly determines the legality of arms transfers to the Assad regime. A review of the legality of so-called "intervention by invitation" is accordingly in place.

IV.A.v. "Intervention by invitation"

39. As a matter of principle, it is accepted that a State (validly represented by its government) can lawfully invite third States to send troops to come to its assistance and can *a fortiori* provide it with arms and other support. Such "intervention by invitation" cannot go against the prohibition on the use force. Moreover, it is accepted that such intervention normally does not infringe the duty of non-intervention either.

The legality of "intervention by invitation" follows *a contrario* from the Definition of Aggression.[119] It finds support in the case-law of the International Court of Justice[120] and in the practice of the UN Security Council,[121] and is widely accepted in legal doctrine.[122] It is nonetheless subject to certain requirements, which presuppose among other things that the territorial State's consent is valid and emanates from the proper authorities.[123]

40. What is particularly important in this context is that numerous authors have taken the view that, although States can invite outside support to quell a local disturbance or insurrection, no valid consent can be given by a government embroiled in a civil war—in other words, that "intervention by invitation" is excluded when the unrest or insurrection develops into a fully fledged civil war.[124] Thus, in its 1975 resolution on "the principle of non-intervention in civil wars", the Institut de Droit International

119 Cf. one instance of aggression is stated to be: "The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement." Definition of Aggression, Annex to GA Res. 3314, above n.99, art. 3(e).

120 Nicaragua case, above n.63, para.246 (referring to "intervention, which is already allowable at the request of the government of a State"); ICJ, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, paras.39–71.

121 SC Res. 387(1976). The preamble of this resolution refers to the "inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States."

122 See, e.g., Ashley S. Deeks, Consent to the Use of Force and International Law Supremacy, 54 Harvard ILJ (2013), 15; David Wippman, Military Intervention, Regional Organizations, and Host-State Consent, 7 Duke JCIL (1996), 209. See also UK Foreign Policy Document No. 148, 57 BYIL (1986), 614 et seq., Part II.6.

123 For a detailed account, see Olivier Corten, above n.93, 259–287.

124 See, e.g., Geir Ulfstein and Hege Fosund Christiansen, The Legality of the NATO Bombing in Libya, 1 ICLQ (2013), 169 (and references); Christine Gray, International Law on the Use of Force (3rd edn. 2008), 81; Oscar Schachter, The Right of States to Use Armed Force, 82 Michigan LR (1984), 1645.

(IDI) asserts that third States "shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State".[125] In a UK Foreign Policy Document published in 1986, a similar position is voiced: "any form of interference or assistance is prohibited … when a civil war is taking place and control over the State's territory is divided between warring parties."[126]

41. If the foregoing position is accepted, third-State assistance to the Assad regime would appear unlawful. Indeed, having regard, for instance, to the intensity of the armed conflict and the fact that different protagonists each control substantial parts of the national territory, it is undeniable that, however the notion be interpreted,[127] the Syrian conflict qualifies as a "civil war" for present purposes.

42. At the same time, while a majority in legal doctrine arguably agrees with the foregoing, this position is not accepted universally. In accordance with the pre-Charter view,[128] a number of scholars indeed insist that the principle of non-intervention must be understood as protecting the State, as represented by the *de jure* government, and thus results in a certain asymmetry, including in situations of civil war, with outside military aid being prohibited for rebels, but permitted for government forces.[129] It is also worth drawing attention to the divergence of views reflected in the voting results of the cited IDI resolution: 16 members voted in favour, six voted against and 16 members abstained.[130]

125 IDI, above n.114, art. 1.

126 UK Foreign Policy Document No. 148, above n.122, Part II.7.

127 Cf. Ibid. refers to a civil war where control over the national territory is divided between the warring parties. The Wiesbaden resolution of the Institut de Droit International (above n.114) seems to define the notion of civil war more broadly and does not require control over territory on the part of the rebel group(s) (art. 1).

128 Affirming that this was the traditional view in international law: Louise Doswald-Beck, The Legal Validity of Military Intervention by Invitation of the Government, 56 BYIL (1985), 196.

129 Dinstein, for instance, emphasizes that the alleged prohibition to extend foreign assistance to a government engaged in a "civil war" is "irreconcilable with traditional international law, and … is equally inconsistent with the modern practice of States". Dinstein sees only two situations where third-State assistance to the government would be prohibited: firstly, when the insurgents are granted recognition of belligerency and third States are accordingly bound to abide by the law of neutrality (note in this context that while the notion remains technically valid up-to-day, no recognitions of belligerency have taken place since 1945; see the overview of "instances of recognition" in Sandesh Sivakumaran, The Law of Non-International Armed Conflict (2012), 17–20), and; secondly, when it has become impossible to identify the *de jure* government (note that the current situation in Syria cannot be equated to such "failed State" scenario). See Yoram Dinstein, War, Aggression and Self-defence (5th edn. 2011), 119–120. For other references, see Olivier Corten, above n.93, 288.

130 See Institut de Droit International, Tenth Commission—Present Problems of the Use of Force in International Law—Intervention by Invitation, Preliminary Draft of

43. Against this background, it is necessary to briefly revisit the key political instruments that have laid the foundation for the customary principle of non-intervention. On the one hand, it is clear that these instruments primarily focus on coercive acts directed against the *de jure* government. Thus, the 1965 Declaration on the Inadmissibility of Intervention states that "armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned".[131] It goes on to state that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State … ." Similar language can be found in the 1970 Friendly Relations Declaration[132] and in the 1981 Declaration on the Inadmissibility of Intervention.[133]

44. On the other hand, the aforementioned instruments also contain language which has a broader scope. Thus, all three Declarations include language prohibiting "interference in civil strife in another State" or "assisting or participating in acts of civil strife".[134] Especially when read in conjunction with the right of self-determination and the concomitant right of peoples to choose their own political future without outside interference,[135] this language would seem broad enough to cover a general prohibition on the furnishing of assistance to a government engaged in a civil war. Caution is nonetheless in order: in her seminal article on intervention by invitation, Doswald-Beck indeed stresses that the *travaux préparatoires* of the cited resolutions are not conclusive in this respect in that the issue was not directly debated, observing that the answer must accordingly be sought in actual State practice.[136]

45. In their in-depth analyses of relevant State practice, Doswald-Beck, and, more recently, Corten, convincingly argue that customary international law appears to prohibit in principle outside interventions aimed at supporting a government in office against rebel forces.[137] On the basis of an examination of the legal claims and

Rapporteur Gerhard Hafner (2007) Annuaire de l'Institut de Droit International (2007), 230n.10.

131 GA Res. 2131(1965), above n.86, arts. 1 and 2.

132 GA Res. 2625 (1970), above n.82, paras.1–2 of the Section on the principle of non-intervention.

133 GA Res. 36(103) (1981), above n.87, arts. 1–2.

134 Note that the ICJ has qualified the relevant passages of the Friendly Relations Declaration, including the prohibition to "interfere in civil strife in another State", as declaratory of customary international law. Armed Activities case, above n.120, para.162.

135 See, e.g., ibid., preamble, referring to the "imperative need … to enable the peoples of all States to determine their own political, economic and social systems without external interference or control".

136 Louise Doswald-Beck, above n.128, 212.

137 See ibid; Olivier Corten, above n.93, 288–310.

counter-claims surrounding relevant precedents, the authors conclude that this will only be different:

- if the (invited) intervention constitutes a "counter-intervention" in response to prior third-State intervention on the side of the rebel group(s). Such counter-interventions are indeed generally regarded as permissible (see below paras.52–55);
- if the intervention does not aim at influencing the course of the civil war, but rather to evacuate third-State nationals or to maintain order or peace.[138]

46. Furthermore, what is crucial for present purposes is that both authors limit these conclusions to interventions consisting in the actual deployment of troops abroad. By contrast, in relation to arms transfer and other assistance, they arrive at a different conclusion. According to Doswald-Beck[139]:

> An alternative defence to intervention [by invitation] would be the assertion by the intervening State that aid is limited to arms and/or advice and that it does not involve direct action against the rebels. … [T]here appears to be no prohibition against States providing governments with weapons and other military supplies during a civil war, and thus the norm of non-intervention does not put governments and rebels on exactly the same footing.

And in the words of Corten[140]:

> [I]t does seem that a legal conviction of a general order can be made out, prohibiting direct military intervention in favour of government forces in the context of a conflict against opposition forces—direct military intervention to which one cannot, however, assimilate the simple provision of arms and equipment, even in times of civil war.

47. There thus seems to be a juxtaposition between two views: a first one, which regards the legal regime governing intervention by invitation as identical for all types of intervention and a second one, suggesting that the regime may not be identical for each type. The former approach is subscribed to, for example, by the 1975 IDI resolution and the cited UK Foreign Policy Document.[141] The latter approach is implicitly reflected, for

138 See in particular Olivier Corten, above n.93, 288–289, 294–300.

139 Louise Doswald-Beck, above n.128, 251.

140 Olivier Corten, above n.93, 296.

141 It appears that many authors pronounce in general terms on the legality of intervention by invitation while relying exclusively on precedents involving the actual deployment of troops (e.g., the US intervention in Granada or the Soviet interventions in Hungary and Afghanistan, …).

instance, in the view, subscribed to by several scholars, that the formal recognition of a rebel group such as the Syrian Opposition Council would effectively open the door to the lawful transfer of arms.[142]

48. How does the Syrian case fit into all this? Several elements relating to the Syrian case render support to the absence in customary international law of a firm prohibition on the provision of arms (and *a fortiori* other support) to a *de jure* government battling rebel groups on its soil. Reference can be made to the French suggestion that the question of arms supplies to the rebels would be looked at "as soon as [the SOC would become] a legitimate government of Syria".[143] More fundamentally, the fact that Russia has openly denounced arms transfers to the Free Syrian Army as unlawful, while asserting the legality of its own arms supplies to Damascus, in combination with the absence of explicit State criticism questioning the legality of such transfers to the Assad regime, could be read as corroborating the view that arms supplies to *de jure* governments and rebel groups are treated differently under international law, even in cases of civil war. As Dapo Akande observes in this context: "There seems to be limited evidence that States accept that they are obliged not to support governments in a civil war situation. In the Syria case no one seems to be suggesting that it is illegal to provide support to the Assad government, though many think and have said that States ought not to do so."[144]

49. Seen from this angle, the Syrian case sets a dangerous and worrisome precedent. Indeed, considering the fact that third-State weapons supplies often tend to prolong the duration of a civil war and complicate the achievement of a political solution, it is much to be desired for arms transfers to both parties in an actual civil war to be treated in identical fashion, and, more specifically, to be equally prohibited under international law (save if the UN Security Council, acting under Chapter VII of the UN Charter, were to decide otherwise). Furthermore, the perception that international law is far more permissive vis-à-vis support (armed or other) on the side of the State authorities, even in situations of civil war, seems fundamentally irreconcilable with the right of peoples to choose their own political future without outside interference. It is to be regretted therefore, that third States have refrained from expressly condemning arms transfers to both sides as an unlawful "interference in civil strife" and a breach of the non-intervention principle.

50. One possible note of comfort in this context could be the claim by Russian Foreign Minister Lavrov, responding to criticism of the planned supply of sophisticated anti-ship and anti-aircraft missiles to Damascus, where he stressed that these weapon systems were solely meant to enable the regime to defend itself to a possible third-

142 See, e.g., Hersch Lauterpacht, above n.112, 95; Dapo Akande, above n.13. See also Michael N. Schmitt, above n.31, 151.

143 See France backs anti-Assad coalition, above n.104.

144 Dapo Akande, above n.13.

State attack, but did not create "any kind of advantages in the fight [of the Assad regime] against the opposition".[145] The latter statement could *a contrario* be read (with some interpretative freedom perhaps) as an implicit recognition that weapons transfers to the Assad regime would not be permitted insofar as they could have an impact on the course of the civil war. If this position were followed through, it could indeed be argued that Russian supplies of anti-aircraft and anti-ship missiles to the Assad regime are incapable of influencing the course of the hostilities between the government and the rebel groups and therefore do not infringe the non-intervention principle.[146] By contrast, other Russian supplies to the Assad regime—e.g., of refurbished Mi-25 attack helicopters[147]—would still violate the non-intervention principle.

51. A second note of comfort concerns the fact that, even if arms transfers to a government engaged in a civil war were not deemed contrary to the non-intervention principle, customary international law, flowing from the duty to "ensure respect" for LOAC would still appear to prohibit such transfers where a substantial risk exists that the arms will be used to commit serious violations of LOAC (see paras.20–25).[148]

IV.A.vi. Counter-intervention

52. Finally, if it were assumed that the principle of non-intervention indeed prohibits intervention (including in the form of arms transfers) in support of a government embroiled in a civil war, it must be recalled that legal doctrine accepts that "intervention by invitation" is exceptionally permissible when it constitutes a counter-intervention in response to prior third-State intervention on the side of the rebel group(s).[149] This position is, for instance, corroborated by the cited UK Foreign Policy Document.[150] As Gray explains, states making forcible interventions in civil wars have almost invariably argued that they did so in response to a prior outside intervention against the

145 Syria Crisis: Russia sends sophisticated Weapons, BBC News, 17 May 2013.

146 As indicated above, it could also be argued that these supplies do not contravene the obligation to "ensure respect" for LOAC, since the weapon systems concerned do not in principle lend themselves to grave breaches of LOAC. See paras.20–25.

147 Tom Parfitt, Russian Ship With Helicopters for Syrian Regime Sets Sail Again, The Telegraph, 13 July 2012.

148 But see above n.146.

149 See, e.g., Olivier. Corten, above n.93, 301; Christine Gray, above n.124, 92, 94–95. Consider also the 1975 IDI Resolution, above n.114, art. 5:

> Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations.

150 The UK Foreign Policy Document, above n.122, Section II.7, finds that "it is widely accepted that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other".

government. On many occasions, the existence of such prior intervention was strongly contested by other States, yet the permissibility of "counter-intervention" has not directly been challenged.[151]

53. Insofar as it is accepted that the concept of counter-intervention (by invitation) permits the deployment of troops to a State plagued by civil war, it is reasonable to assume that counter-intervention can *a fortiori* justify the transfer of arms. Put differently: even if (Russian or other) arms transfers to the Assad regime were to be deemed contrary to the non-intervention principle, they could still be justified insofar as it were demonstrated that they constituted a reaction to prior arms transfers by other third States to the FSA and/or other NSAGs.

54. Furthermore, if it is accepted that third-State arms transfers to the government are normally excluded on account of the non-intervention principle in situations of civil war, the question also arises whether such transfers would in turn justify support to the NSAG(s) battling the *de jure* government—put differently, whether the concept of "counter-intervention" works both ways. The UK Foreign Policy Document No. 148 and the 1975 IDI Resolution suggest that this is indeed the case.[152] At the same time, it is not fully certain whether this position effectively corresponds to State practice. It is indeed hard to shake the feeling that the lion's share of precedents cited in legal doctrine concern "counter-interventions" (allegedly) at the invitation of the *de jure* government.[153] Again, in relation to the Syrian civil war, to the author's knowledge no claims were made suggesting that arms transfers to the FSA would somehow constitute a lawful form of counter-intervention in reaction to prior arms supplies to the Assad regime.

55. In any event, the entire concept of counter-intervention gives rise to problems of proof and verification and arguably lends itself to abuse. Gray observes in this context that counter-intervention is arguably "the best established exception to the prohibition of intervention and possibly the most abused".[154] In numerous past cases, it was indeed highly uncertain whether or not prior intervention had taken place. Such uncertainty will be all the greater where the prior intervention is said to consist of covert arms supplies (rather than the actual sending of troops): States supplying arms to one party may simply rely on baseless allegations of prior weapons supplies to the other party to justify

151 Christine Gray, above n.124, 92, 94–95.

152 See above, nn.149 and 150.

153 See, e.g., the analyses of Christine Gray, above n.124, 92 (Gray refers to counter-interventions "at the request of the government"), Olivier Corten, above n. 93, 260–261 ("I know of no precedent where one State has claimed to justify legally its intervention in another State's territory on the strength of a call by the opposition alone."); and Louise Doswald-Beck, above n.128.

154 Christine Gray, above n.124, 92.

their own conduct—verification of these allegations may prove difficult, if not impossible. Secondly, one may wonder what modalities apply to such "counter-intervention" (an in-depth analysis of relevant State practice is beyond the scope of the present contribution. Such analysis would certainly seem a worthy enterprise, even if it is doubtful whether it would provide any straightforward answers). According to Corten, counter-intervention ought to be "confined to riposting outside interference".[155] It is unclear, however, how to translate this suggestion into more operational terms in the context of arms transfers to the parties in a civil war. Should the arms transfers to one party somehow be aimed at balancing the odds and/or be commensurate from a qualitative or quantitative perspective to prior arms transfers to the other party? Again, State practice would at first sight not seem to provide a clear-cut answer ….

IV.B. Non-lethal assistance, funding and other support

56. If the foregoing section dealt with the compatibility of arms transfers with the prohibition on the use of force and the non-intervention principle, it must be recalled that the United States as well as a number of EU Member States have also supplied the FSA with so-called "non-lethal assistance", including body armour and armoured personnel carriers (see above para.3). Furthermore, in May 2013, the EU voted to lift sanctions to allow opposition groups to sell oil from the oil fields located in the territory controlled by them. Thus, Article 6 of Council Decision 2013/255/CFSP[156] states that: "[w]ith a view to helping the Syrian civilian population, in particular to meeting humanitarian concerns, restoring normal life, upholding basic services, reconstruction, and restoring normal economic activity or other civilian purposes …, the competent authorities of a Member State may authorize the purchase, import or transport from Syria of crude oil and petroleum products" provided that a number of conditions are met, including the requirement that the "[SOC] has been consulted in advance by the Member State concerned."[157] The implication is that the EU opened the door to buying oil from the SOC, while the embargo remained in place vis-à-vis the Assad regime. Conversely, it was reported that the Assad regime has received funds from Iran and possibly also from Russia.[158] It is also worth noting that, pursuant to calls from Sunni preachers, hundreds of youngsters from various countries (including various European countries)

155 Olivier Corten, above n.93, 306.

156 Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, OJ 1 June 2013, L-147/14.

157 The Council Decision contains analogous provisions enabling the "sale, supply or transfer of key equipment and technology for the key sectors of the oil and natural gas industry in Syria" (art. 10); the "granting of any financial loan or credit to or the acquisition or extension of a participation in enterprises in Syria that engaged in the Syrian oil industry sectors …" (art. 16); and the opening by financial institutions under their jurisdiction of "representative offices, subsidiaries or banking accounts in Syria" (art. 23)—each time subject to advance consultation of the SOC. Ibid.

158 Report of the Commission of Inquiry, above n.4, para.19.

have travelled to Syria to join the ranks of anti-government forces (just as young Iraqi Shiites have joined on the side of the Syrian army).[159]

57. Against this background, it must be reiterated that the scope of the non-intervention principle is not limited to the actual sending of troops or to the provision of arms and military training, but also includes other forms of support. The 1965 Declaration on the Inadmissibility of Intervention, for example, states in general terms that "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State …".[160] The ICJ for its part acknowledges in the *Nicaragua* case that "the provision of strictly humanitarian aid to persons or forces in another country" is not contrary to international law,[161] nor is the cessation of economic relations with the government of another country.[162] The Court does assert that the "mere supply of funds" to rebel groups, although excluded from the ambit of the prohibition on the use of force, "undoubtedly" constitutes an act of intervention.[163] It eventually finds that the United States violated the principle by "training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua".[164]

58. It is somewhat peculiar that the supply of "non-lethal assistance" to the FSA by the United States as well as by several EU Member States has seemingly not attracted express legal criticism (in contrast to the express legal objections to arms transfers to the FSA). From the perspective of the ICJ case law and the UNGA instruments relating to the non-intervention principle, no distinction is made between the two types of support: the transfer of arms to rebel groups operating in another State is an infringement of international law, just as much as the transfer of "non-lethal assistance".

59. At the same time, in the context of a civil war, where the opposing sides each control part of the national territory, the non-intervention principle, as interpreted in the ICJ's case-law and the relevant practice of the UNGA, leaves a number of questions unanswered (especially when such situation persists for a longer period of time). A strong contrast exists between civil wars, on the one hand, and large-scale international armed conflicts on the other hand. As is well-known, conflicts of the latter type are indeed subject to the law of neutrality. Even if the application of neutrality law is

159 See, e.g., Increase in Europeans fighting in Syria, EU Observer, 4 December 2013; Aryn Baker, Jihad for Beginners: Westerners Fighting With Al-Qaeda in Syria, Time, 14 November 2013.

160 GA Res 2131(1965), above n.86, art. 2. See also GA Res. 2625 (1970), above n.82, Section on the principle on the non-use of force, para.9.

161 Nicaragua case, above n.63, para.242. See also UK Foreign Policy Document No. 148, above n.122, Part II.7.

162 Nicaragua case, above n.63, paras.244–245.

163 Ibid., para.228.

164 Ibid., *dispositif*.

strongly affected by the Charter provisions on the use of force,[165] and even if this branch of law is largely customary international law and has long been in need of codification,[166] it provides guidance on whether a third State can engage in commercial transactions with a party to a conflict, whether it should take action against the recruitment of fighters on its soil, etc.[167]

60. Yet, the law of neutrality as such only applies to large-scale international armed conflicts, not to non-international armed conflicts—save in the extremely rare situation where third States choose to recognize a situation of belligerency (a situation that has not materialized during the Charter era).[168] The Syrian civil war indicates that there is perhaps, to certain extent, a legal vacuum in this context. It is open to discussion, for instance, whether third States can lawfully purchase crude oil from Syrian rebel groups or whether they are legally obliged to take steps to prevent persons under their jurisdiction from joining one of the warring parties in the conflict.

61. From the ICJ's case law and the relevant UNGA Declarations, it can be deduced that "coercion" is the crux of "intervention".[169] In situations involving civil strife,

165 See on this the different views of Heintschel von Heinegg and Schindler: Wolff Heintschel von Heinegg, "Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality, in: Michael N. Schmitt and Jelena Pejic (eds.), International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein (2007), 543; Dieter Schindler, Transformations in the Law of Neutrality Since 1945, in Astrid J.M. Delissen and Gerard J. Tanja, Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven (1991), 368. Consider also: Maria Gavouneli, Neutrality—A Survivor? 23 EJIL (2012), 267.

166 Michael Bothe, The Law of Neutrality, in Dieter Fleck (ed.), The Handbook of International Humanitarian Law (2nd edn. 2008), 574.

167 Thus, in his overview of the law of neutrality, Bothe finds for instance that:
Under the law of neutrality, a neutral State "is entitled to continue existing commercial relations … . A change in commercial relationships favouring one of the belligerents would, however, constitute taking sides in a manner incompatible with the status of neutrality" (ibid., 572).

> [I]t cannot and is not required [for a neutral State] to prevent its nationals from entering the service of a party to the conflict on their own initiative and responsibility. … If the state tolerates the establishment of so-called volunteer corps …, this amounts to a non-neutral service. The same applies where … the neutral state tolerates publicity for the establishment of troops by the parties to the conflict. (Ibid., 587).

Compare IDI, above n.114.

168 See, e.g., Sandesh Sivakumaran, above n.129, 17–20.

169 Nicaragua case, above n.63, para.205; GA Res. 2625 (1970), above n.82, section on the non-intervention principle, para.2. See also Maziar Jamnejad and Michael Wood, The Principle of Non-intervention, 22 Leiden JIL (2009), 345, 347–348. S. Talmon, above n.101, 247–248.

(unlawful) intervention could therefore be understood as referring to all third-State support or assistance that is capable of influencing the course of the hostilities. This is also the view adopted in the 1975 IDI resolution, according to which third States are prohibited from "giving any party to a civil war any financial or economic aid likely to influence the outcome of that war" (Art. 2(d)). The implication of this approach is that the provision of non-lethal assistance, such as body armour or armoured personnel carriers, arguably violates the non-intervention principle. On the other hand, strictly moral/political support that is unaccompanied by military or other assistance, for example, in the form of a (political) recognition of an opposition group as "legitimate representative of a people", would not seem to be a coercive act capable of infringing the non-intervention principle.[170] As far as the provision of funding to NSAGs or commercial transactions with such groups—e.g., relating to the import and export of crude oil—are concerned, it may be necessary to examine on a case-by-case basis to what extent there exist guarantees that the funds/revenues are not used to contribute to the general war effort, but rather for humanitarian aid, for reconstruction or for other civilian purposes (as the cited Council Decision 2013/255/CFSP suggests). It remains uncertain, however, whether the foregoing also applies to the transfer of funds to, or commercial transactions with, the *de jure* government—State practice suggests, for instance, that purchasing crude oil from a government engaged in a civil war remains permissible as long as this possibility has not been curtailed by the UN Security Council. This may again be an aspect where rebel groups and *de jure* governments are treated differently under international law.

62. In all, the non-intervention principle remains "quite elusive"[171] and may simply lack the required determinacy when confronted with large-scale (and long-lasting) civil wars where the national territory is divided between the warring parties to serve as a useful yardstick to determine what third States can or cannot do. As Jamnejad and Wood rightly point out: "further research into the important, although obscure, subject of non-intervention"—in particular in the form of an in-depth assessment of relevant State practice—is necessary and long overdue.[172] Alternatively, in order to overcome the elusiveness of the non-intervention principle, the law of neutrality could perhaps serve as inspiration to interpret and refine the general obligation not to "interfere in civil strife".

V. Conclusion

63. The present contribution has tried to shed light on the legality of third-State assistance to the parties involved in the Syrian civil war by assessing relevant legal obstacles

170 In this sense, see Stefan Talmon, above n.101, 248.

171 Ibid., 247.

172 Maziar Jamnejad and Michael Wood, above n.169, 380.

and possible justifications.[173] In particular, it has focused on the duty to "respect and ensure respect" for LOAC as well as the non-intervention principle.

64. As to the former, there appears to be convincing evidence that the duty to "respect and ensure respect" for LOAC encompasses an obligation to refrain from providing assistance to known LOAC offenders. Given the fact that both government and anti-government forces are known to have committed serious violations of LOAC, arms transfers to both parties are in principle unlawful. Absent indications that States arming the FSA have taken steps to ensure that the weapons supplied are not used for the commission of crimes against humanity and/or war crimes, this conclusion is not affected by the mere fact that the FSA has formally declared its intention to comply with LOAC. An argument could be made that the provision of non-lethal assistance, such as body armour or armoured personnel carriers, does not breach the duty to "respect and ensure respect" for LOAC—even if such assistance may sustain the general war effort and thus indirectly contribute to the commission of grave breaches. More controversially, it can be doubted whether the duty to "respect and ensure respect" also prohibits the supply of weapons, such as anti-ship missiles or anti-aircraft missiles, that are unlikely to be used for the commission of serious violations of LOAC.

65. Irrespective of the disregard for LOAC on both sides, it is uncontroversial that third-State supplies of arms to a rebel group in principle violate the duty of non-intervention, and arguably also the prohibition on the use of force. Arms supplies to the SOC/FSA cannot be justified by somehow invoking the right of self-determination. In a similar vein, third States cannot escape from the constraints of the prohibition on the use of force and the non-intervention principle simply by recognizing the SOC as the new *de jure* government. Suggestions to this end risk rendering the prohibition on the use of force and the non-intervention principle devoid of meaning and go against the well-established principle—reflected in the restraint shown by third States (politically) recognizing

173 The present contribution has not elaborated on the possibility to invoke counter-measures as a ground precluding wrongfulness to justify the transfer of arms and other assistance. It may be noted, however, that DASR, above n.38, arts. 49–54 do not envisage the possibility to take counter-measures in the collective interest. Indeed, according to the ILC Commentary, there appears at present "to be no clearly recognized entitlement of [all States] to take counter-measures in the collective interest." ILC, above n.39, 139. It may moreover be noted that counter-measures cannot affect the prohibition on the use of force, which would at least seem to rule out the transfer of arms. Furthermore, reliance on counter-measures would be all the harder insofar as there is a risk that the assistance provided is used for the commission of serious violations of LOAC or human rights violations (cf. according to DASR, above n.38, art. 50(1), counter-measures shall not affect obligation for the protection of fundamental human rights; obligations of a humanitarian character prohibiting reprisals, and; other *jus cogens* obligations). There is moreover a further difficulty in that accepting counter-measures in the present context would create an inverse imbalance: counter-measures can only be taken in reaction to internationally wrongful conduct of a State, not of a non-State armed group.

the SOC as legitimate representative of the Syrian people—that the premature recognition of governments is unlawful.

66. Does the non-intervention principle similarly exclude the transfer of arms to the *de jure* government? While a majority of legal doctrine agrees that "intervention by invitation" is excluded in cases of civil war, the Syrian case would seem to strengthen the perception that international law is more permissive vis-à-vis aid (armed or other) to State authorities than to rebel groups, even in situations of large-scale non-international armed conflict. It is indeed striking to note that Russia has explicitly claimed that arms supplies to Damascus were permitted under international law, without this position being explicitly challenged by other States. It would seem wise not to come to rash conclusions in this context. The idea that weapons transfers to a government engaged in a civil war are lawful is indeed hard to reconcile with the principle that third States should abstain from "interference in civil strife" and with the right of peoples to choose their own political future absent outside interference.

67. On a different note, if it is accepted that arms transfers to the *de jure* government are just as unlawful as transfers to the rebel groups, it must be recalled that, even in situations of civil war, "intervention by invitation" is exceptionally deemed permissible when it constitutes a counter-intervention in response to prior third-State intervention on the side of the rebel group(s). In concrete terms: arms supplies to Damascus would not infringe the non-intervention principle if the supplier States could somehow demonstrate that the supplies constituted a riposte to prior arms transfers to the rebel groups. It has been occasionally suggested that the concept of "counter-intervention" works both ways, and that it could accordingly also be invoked to justify arms transfers to the rebel groups—whether this position finds support in State practice is, however, unclear. In any case, it is no secret that the concept of counter-intervention is prone to abuse. It is not difficult to imagine a third State relying on baseless allegations of prior arms supplies to one party to a civil war in order to justify equipping the other party. There seems to be little the international community can do to reduce this risk, apart from clearly affirming that in civil war settings the non-intervention principle applies both ways (vis-à-vis the government as well as its challenger(s)) and—it is hoped—identifying, naming-and-shaming and penalizing offenders.

68. Furthermore, it is striking that, while the transfer of arms has given rise to legal objections, the transfer of non-lethal assistance to the FSA has apparently gone unchallenged. As follows from the case-law of the ICJ and the resolutions of the UNGA, however, the scope of the non-intervention principle is substantially broader than the sending of troops and the transfer of weapons. In accordance with the 1975 IDI resolution on "non-intervention in civil war", it could be interpreted as covering all assistance capable of influencing the course of hostilities, which would arguably rule out the provision of body armour and armoured personnel carriers to the FSA.

69. On a final note, it is stressed that the non-intervention principle remains quite vague and elusive, undermining its potential to serve as a useful yardstick in cases of

large-scale non-international armed conflict to determine what third States can or cannot do (e.g., whether or not States can purchase crude oil from rebel groups in rebel-controlled territory). Further research on the scope of the non-intervention principle is necessary and long overdue. Alternatively, the law of neutrality could perhaps serve as inspiration to interpret and refine the general obligation not to "interfere in civil strife".

70. In the end, enhancing the determinacy of the normative framework discussed above, and specifically of the non-intervention principle, is much to be desired. One should indeed not lose sight of the fact that outside intervention in non-international armed conflicts has a tendency to prolong and intensify such conflicts, to increase the risk of spill-over effects, and, consequently, to make it more difficult to reach a political solution. In the words of the Commission of Inquiry[174]: "[t]hose who supply arms create but an illusion of victory".

174 Report of the Commission of Inquiry, above n.4, summary.